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In The

Supreme Court of the United States

October Term 1966
No. 204

RICHARD ALLEN DOWDLE,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

In the Matter of the Application of

MATTHEW T. HOGAN, ESQ.,

Appellant,

v.

GORDON HOWE, Treasurer of Monroe County, New York; JOHN C. LITTLE, District Attorney, and HON. ARTHUR LEVITT, Comptroller of the State of New York,

Appellees.

BRIEF OF APPELLANTS IN REPLY TO MOTION TO DISMISS

JOHN MANNING REGAN, ESQ.
CORBETT, HOGAN, REGAN & WHITAKER
Attorneys for Appellants
100 Times Square Building
45 Exchange Street
Rochester, New York 14614

Daily Record Corporation
Rochester, New York

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Opinions Below

The Opinion of the Court below appears at 16 N. Y. 2d 1037, (1965).

Jurisdiction

The Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. 1257(2). The Jurisdictional issue is treated fully in the Statement previously filed in accordance with Rule 15.

Constitutional Provisions

U. S. Constitution, Amendment XIV—Section 1 . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The State statutes involved in this case are set forth verbatim in the Jurisdictional Statement of Appellant, and in the appendix to the brief of the appellee on its Motion to Dismiss.

Questions Presented

(1) Whether the Fourteenth Amendment to the Constitution of the United States, and, specifically, the due process and equal protection clauses thereof, requires a State: (a) to pay assigned counsel, in a felony case, some compensations in order to enable him to render necessary legal services *AND,* (b) to provide to assigned counsel some funds for reasonable expenses to cover the cost of expert witnesses' testimony which he wants to employ in the conduct of the defense of an indigent accused.

(2) Whether a conviction obtained — even on a plea of guilty — in the absence of funds to assigned counsel for

expert witnesses necessary in the defense of the accused indigent, and in the absence of funds for legal services rendered, is a denial of due process of law, and, considering that the State pays the prosecutor and *all* the prosecution witnesses, a denial of equal protection of the law.

(3) Whether a State may require an indigent defendant and his counsel to make a preliminary application to the trial judge and a showing of merit as a pre-condition to the employment of expert witnesses in a felony case. Whether, in fact, a State may subject an indigent to this procedural requirement for the first time on an appeal after his conviction.

Statement of the Case

On December 26th, 1963, Dowdle "grabbed" Joan Henderson, a 19 year old girl, at a bus stop in Rochester, New York. It was 8:00 o'clock in the morning. Passers-by frightened Dowdle away. The girl was not harmed. (R. p. 3, 22).

The Grand Jury of Monroe County indicted Dowdle for attempted first degree Rape (R. p. 3). County Court assigned Matthew T. Hogan to represent Dowdle, an indigent. (R. p. 13).

The State examined Dowdle psychiatrically to determine only *ONE* issue: Whether he was competent to stand trial. Section 662 of the New York Code of Criminal Procedure limits the report to that issue. N. Y. Code of Criminal Procedure, Section 658, Section 870 et seq. Appellant is filing as an exhibit in this Court, a duplicate original of that report, duly signed by Drs. Pollack and Feldman of the Rochester State Hospital. It is a public record. A copy is appended to this brief at the end.

Both that report, and the letter of Doctor William Libertson which appears in the record, disclose that Dowdle was a patient undergoing psychiatric treatment in the Rochester State Hospital at the time he "grabbed" Miss Henderson. In addition, together they disclose a similar psychiatric diagnosis of psychopathic personality, without mental disorder.

Procedurally, this case collapsed after that psychiatric examination. Doctor Libertson's report on May 11, and the State report on May 13, agreed that the defendant was not psychotic. Assigned counsel then pleaded defendant guilty to the felony charge. Thereafter, assigned counsel and others moved to withdraw the guilty plea. Doctor Libertson's report and the psychiatric history revealed a classic case of psychopathic loss of volitional control over conduct. They provided as well, grave doubts about the intentions of Dowdle as he "grabbed" Miss Henderson. What Dowdle thought, what he wanted, what his state of mind was, were all put in question by the psychiatric history. That was a legitimate defense. While the reports were enough to convince the trial court to withdraw the plea, they were not enough to bring the case to trial. That required money for expert testimony. To get this testimony, to retain experts who would contest Doctor Pollack's routine diagnosis, and who would elaborate upon and explain Doctor Libertson's opinions on the defendant's state of mind, counsel turned to the Monroe County Indigent's Defense Program, Thomas Hatrzell, Esq., Director. His answer: There was no money for such things. The Record (p. 11) shows that appellants tried to put Hartzell's testimony on the record in order to avoid technical objections to this factual data, but the Courts below denied examination of Hartzell or the District Attorney.

The District Attorney was sympathetic. He suggested a reduced charge, the misdemeanor of Third Degree Assault. With such an offer, and with no money to defend, pleading not guilty meant a much longer stay in the County Penitentiary than did a plea of guilty. Dowdle had no bail money. A misdemeanor meant a one year limit to his sentence. He had already been confined from February until July.

Although both defendant and assigned counsel wished to defend against *all criminal charges*, the no bail-no money-system, combined with defendant's incarceration until some final disposition was had (N. Y. CODE OF CRIMINAL PROCEDURE, Section 515, 517 bars appellate review of interlocutory issues)[1] coerced a guilty plea to the misdemeanor. Imagine it! The law's procedural requirements automatically sentenced Dowdle to jail for a longer time if he pleaded not guilty than if he pleaded guilty. Yet in the face of this form of coercion, our Court of Appeals has said:

> "Appellant does not demonstrate any legal infirmity in the judgment of conviction for assault, third degree, entered on his plea of guilty. 16 N.Y. 2d at 1038.

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[1] There was no way to ask a State appellate court to provide funds in advance of trial. The law required some kind of final disposition of the case, then an appeal. This procedure lengthens the time of an indigent's incarceration who wants appellate review of such a preliminary question as here presented. The trial court was bound by the decision in *Marcus v. Joseph*, 305 N.Y. 813 (1953), and could do nothing.

ARGUMENT

POINT I

The insanity defense has merit, and New York has deprived Dowdle of an opportunity to present it at trial.

Justice Felix Frankfurter, dissenting in *United States v. Baldi*, 344 U. S. 561, 73 S. Ct. 391, 97 L. Ed. 549 (1953), stated:

> "A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguards of due process in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment." 344 U.S. at p. 571.

The facts of the *Baldi* case also showed how State procedures, like lack of bail, lack of experienced trial counsel, and lack of funds, hamstrung a defendant. And as the late Thomas McBride, Esq. argued then, appellant argues here and now. State procedures have combined to deny appellant adequate opportunity to present the legitimate defense of insanity, and have denied him "the effective assistance of counsel".

First of all, appellant must show how New York recognizes insanity as a defense to crime.

Ever since *People v. Horton*, 308 N.Y. 1, (1955), New York's standards for legal insanity have been changing. The criteria are in flux. In *People v. Wood*, 12 N.Y. 2d 69 (1962), three judges of our court voted to dismiss an indictment because the right-wrong standard was so inadequately applied.

In 1965, New York's Legislature amended Section 1120 of the Penal Law to provide a standard for insanity that excused criminal responsibility if, at the time of the act, there was, as a result of mental disease or defect, substantial inability to appreciate the consequences of such conduct. This is a wholly new concept, as yet uninterpreted by our Court of Appeals.

In 1966, in *United States v. Freeman,* 357 F. 2d 606 (1966), the Second Circuit Court of Appeals reversed a conviction based on M'Naughten's rule, and directed a new trial on a new irresistible - impulse - product - of - mental - disease standard of insanity. That court is not without influence in the Courts of New York State.

What the next developments will be is anyone's guess. What is relevant here is that Dowdle can easily come within the scope of these changing standards. He need no longer trailblaze a defense. The preliminaries have already established his right to present his psychiatric evidence as a complete defense to the charge of criminal responsibility. Some of this development was obvious at the time of Dowdle's arraignment in July, 1964. Now, his legal rights are even more demonstrably evident.

If this Court grants a new trial, Dowdle will become the beneficiary of the newly enacted provisions of COUNTY LAW, Section 722, et seq. of New York. He will have his psychiatric experts at his new trial, not only in respect to this case, where he received but a one-year sentence; but also, in respect to an indictment for burglary, second degree, filed May 14th, 1965, wherein he received a sentence of fifteen (15) years, the maximum which the law allows. N. Y. PENAL LAW, Section 407 (2). The State got that burglary conviction under circumstances identical to this case wherein it provided no psychiatric assistance to as-

signed counsel, notwithstanding the fact that the police captured Dowdle fondling women's undergarments in a girls' dormitory.

This appeal therefore is not an academic exercise so far as Dowdle is concerned. He appeals to this Court for an order vacating his conviction because—as Justice Frankfurter said—"A denial of an adequate opportunity to sustain the plea of insanity is a denial of the safeguards of due process . . ."

All along the line of argument in this case, the respondents and the State Courts have concluded this issue by saying:

> ". . . no constitutional rights of the defendant are shown to have been violated since he had the benefit of the physician's services." 16 N.Y. at p. 1038.

Yet that is the point defendant has put in issue! Defendant claims his plea of guilty and his sentence were the product of his being unable to have psychiatric testimony available to him. True, Dowdle benefitted by a reduced charge as a result of Doctor Libertson's report. But what of it? He had a defense to the whole idea of criminal responsibility and the State deprived him of the means to assert it at trial. Not only that, State procedures compelled him to sit in jail during any time he tried to compel the state to provide him with free psychiatric testimony. The whole history of Section 308 of Code of Criminal Procedure, and how it puts a heavy burden of preliminary proof on an indigent defendant in order to justify public expense appears in *People v. Leach*, 42 Misc. 2d 143 (1964). But that is for a capital case! Dowdle, indicted for a non-capital felony, did not come within the provisions of Section 308 at the time of his arraignment. Under State law, he was entitled to nothing. There is no benefit to him if the

law gives him nothing! Of this situation, Judge Van Voorhis, dissenting in the *Marcus* case, said:

> "Section 658 et seq. of Code of Criminal Procedure . . . were not intended to supersede the right of an impecunious defendant in a criminal prosecution to present the defense of insanity to a jury or other trier of fact. *It would be unjust to have allowed this defense to be interposed, in other than capital cases, only by such defendants as could afford to employ a psychiatrist.*" *Marcus v. Joseph,* 281 App. Div. at p. 338 (1953).

To decide this case upon the assumption that Dowdle received the *full* benefit of his defense from the preliminary report of Doctor Libertson, when Dowdle has attacked the system whereby he receives no *testimonial benefit* from that psychiatrist is to assume the point in issue, usurp the trier of fact, and foreclose inquiry into a serious constitutional deprivation. Compare *Bush v. Texas,* 372 U. S. 586 (1963).

POINT II

State Law prohibiting payment of compensation to assigned counsel for indigents but providing for payment of compensation to prosecutors denies *Dowdle* the equal protection of the law.

The Courts who have treated the problem, (See Weintraub, J. in *State v. Rush,* 46 N. J. 399 (1966); and the writers who have delved into it, (Compare *Right to Aid in Addition to Counsel for Indigent Criminal Defendants,* 47 *Minn. L. Rev.* 1054 (1963) with *Equal Protection to the Indigent Defendant*: 16 *Stan. L. R.* 394, 413 (1964).); agree that the comparison of equivalency is between an indigent defendant and a defendant who can afford to pay.

This is not the argument Matthew T. Hogan, appellant herein, wishes to make in this court. The State of New York has no obligation to supply funds to a defendant of means. What *Gideon v. Wainwright,* 372 U. S. 335 (1963), did was to require a State to provide counsel for indigent defendants,—those without means. That decision must mean that no state can discharge that obligation in an unequal way. States must provide counsel equally.

Most states provide counsel to the executive branch of government in order to prosecute violators of State Law. England and Commonwealth countries do so by hiring private attorneys to prosecute on a case-by-case basis. American States have generally created the office of a public prosecutor, a district attorney. *Gideon* imposed the further duty on States to provide indigent defendants with the "effective assistance of counsel". This Court imposed that duty to enforce a constitutional mandate in the Sixth and Fourteenth Amendments.

Appellant Hogan argues that New York creates inequalities between prosecutors and defenders by supplying the

former with the public purse and by denying the latter any funds at all. This inequality is the product of State statutes. The law has created it.

Section 825 of the County Law of New York provides:

> '. . . The Count Judge, or the Special County Judge, of the County of Monroe, or any Supreme Court Justice, shall have power, on the application of the District Attorney of Monroe County, to order and direct the County Treasurer of Monroe County, to pay to the District Attorney *any sum of money* expended or incurred by him in the performance of the duties of his office . . .'' (Emphasis added)

At the very same time, the State's very same County Law provided, in respect to counsel defending Dowdle:

> Section 718—Appointment of Other Counsel
>
> Nothing contained herein shall preclude a Court on its own motion, or upon application of the Public Defender, or by the indigent defendant, from appointing an attorney other than the public defender. . . . If such attorney is appointed, he shall serve without compensation, unless such compensation is otherwise provided by law.

Since Monroe County *never had, does not have now,* and *probably never will have, a public defender's office* for defense of felony cases, only the last sentence applies to criminal cases like Dowdle's.

For the State, as a matter of law, to grant prosecutors limitless funds as compensation for duties of their office, and to deny any funds at all as compensation to assigned counsel for the performance of their duties, is a clear-cut deprivation of equality before the law to indigent defendants. And it is likewise a clear-cut violation of the constitutional command of the Fourteenth Amendment:

> ''No State shall deny to any person within its jurisdiction, the equal protection of the law.''

POINT III

Preliminary showings of merit to qualify for State Aid in defense of indigents is unconstiutional.

The Court of Appeals very clearly limited its decision to the rights of the psychiatrist and the attorney when it required prior approval of hiring an expert witness. It did not say Dowdle had to make prior application. But, of course, this is a metaphysical fiction. What procedures a Court requires of the defense affect Dowdle, the defendant.

Section 308 of the Code of Criminal Procedure did not apply to felony defendants in non-capital cases when the State tried Dowdle. There was *no* procedure for him to pursue to get money for psychiatric testimony.

People v. Leach, 42 Misc. 2d 143 (1964) does give a good presentation of what a New York trial court would require as a preliminary showing to qualify for State assistance. The burden is heavy. The decision is wholly up to the Court.

These procedures violate the holdings of this Court in *Douglas v. California*, 372 U. S. 353, and *Draper v. Washington*, 372 U. S. 487 (1963) because they:

1) Substitute the judgment of the Court for counsel's judgment.
2) Impose stricter procedural burdens on an indigent than on prosecutors or on defendants who can pay.

CONCLUSION

Appellants respectfully ask this Court to deny the Motion to Dismiss and note probable jurisdiction.

Respectfully submitted,

CORBETT, HOGAN, REGAN & WHITAKER
Attorneys for Appellants
100 Times Square Building
45 Exchange Street
Rochester, New York 14614

APPENDIX

Report of Qualified Psychiatrists

THE PEOPLE OF THE STATE OF NEW YORK

against

RICHARD ALLAN DOWDLE

Defendant

STATE OF NEW YORK }
COUNTY OF MONROE } ss:

We, the undersigned, duly certified as qualified psychiatrists by the Board of Psychiatric Examiners of the Department of Mental Hygiene of the State of New York, having been appointed by L. L. BRYAN, M.D., Acting, Director of the ROCHESTER State Hospital, at ....., New York, pursuant to an order signed by Hon. HARRY L. ROSENTHAL at a term of the COUNTY Court, held in and for the County of MONROE, at the County Court House in the City of ROCHESTER, on the 13th day of MAY, 1964, in accordance with the Code of Criminal Procedure to examine RICHARD ALLAN DOWDLE, the above defendant, to determine the question of his sanity and to report to the court, state that we have forthwith conducted such examination with due care and diligence, pursuant to the Code of Criminal Procedure and we have come to the following opinion as a result of such examination:

It is our opinion that the defendant RICHARD ALLAN DOWDLE is not in such state of idiocy, imbecility, or in-

sanity as to be incapable of understanding the charge against him or the proceedings or of making his defense.

/s/ BENJAMIN POLLACK M. D.
BENJAMIN POLLACK

/s/ HAROLD FELDMAN M. D.
HAROLD FELDMAN

STATE OF NEW YORK }
COUNTY OF MONROE } ss:

BENJAMIN POLLACK, M.D., HAROLD FELDMAN, M.D. being severally sworn, each for himself, deposes and says that each has read the foregoing report, by him subscribed and knows the contents thereof and that the same is true of his own knowledge, except as to the matters stated to be upon information and belief, and as to those matters, he believes them to be true.

/s/ BENJAMIN POLLACK M. D.
BENJAMIN POLLACK

/s/ HAROLD FELDMAN M. D.
HAROLD FELDMAN

Subscribed and sworn to
before me this 15th day
of May, 1964.

/s/ GRACE M. GUEST
Notary Public, Monroe County
New York
My commission expires, March 30, 1965

The duly appointed psychiatric examiners to examine and report in the case of Richard Allan Dowdle do state that on May 15, 1964 we examined the said defendant in one of the medical offices at the Rochester State Hospital. Both of the examiners had previously examined this man while he was a patient at the Rochester State Hospital from November 7, 1962 until January 13, 1964, where we are fully aware of his previous history and the fact that he had previously been a patient at the Willard State Hospital in 1961, and at the Rochester State Hospital from June 30, 1961 until August 8, 1961. During all his admissions he had been diagnosed as Without Mental Disorder, Psychopatic Personality, Pathological Sexuality.

The duly appointed examiners had conducted an extensive examination of this man on January 13, 1964. We are aware of the fact that his laboratory and physical examinations are negative. He appears to be of better than average intelligence. When examined on this date, he talked freely, readily, and frankly. He appeared somewhat tense and anxious, but he readily admitted his past difficulties and gave a good story and description of them. He realizes that his conduct has been abnormal for the past seven years or more, and he earnestly desires help and has sought it from time to time. He claims that he has tried to control his urges and has attempted to conform to conventional behavior but has been unable to do so. There is no evidence of hostility, rationalization, projection, or hostility to people. He remarks that there must be something wrong with him since he realizes that what he has done over the years has been abnormal. He claims he has no desire to hurt people. He has sought treatment and help from others without any particular alleviation in his tendencies or impulses.

Recommendations

1. This man has shown an abnormal personality reaction over many years, going back at least seven or eight years and possibly much longer.

2. There is much desire for conformity and a feeling for the need for help.

3. He is distressed, perplexed, and uneasy at his consistent inability to conform to the normal demands and conventions of society.

4. To date, hospitalization or treatment elsewhere has been of little or no help in the alleviation of his problems.

5. He has shown no dangerous tendency to date, but his habits have been annoying and frightening to others.

6. He requires confinement and psychiatric treatment if there is to be any hope of rehabilitating this defendant.